87- 565 (1)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. _____

BILLY R. HASTON

SERGEANT MAJOR, UNITED STATES

ARMY, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether a military judge denied the appellant his rights under the Sixth Amendment of the Constitution to a public trial, to be confronted with the witnesses against him and to the assistance of counsel, when the military judge instructed the prosecutor to refresh the recollection of a faltering witness who was on the stand at the time (i.e., a young child victim of a sex offense) in the confines of the prosecution's office during the noon-time recess of court; and the prosecution did so, thereby considerably enhancing the testimony of the witness, and did so without the presence of the accused, his attorney, the trial judge, the court reporter and the jury; and without the objection of the trial defense counsel who otherwise demonstrated a pronounced pattern of ineffi-

ciency during the trial, and who admitted-
ly closed his eyes during approximately
100 pages of trial testimony.

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The petitioner, Billy R. Haston, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Military Appeals in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at 24 M.J. 313 (CMA, 1987) (Appendix A). The opinion of the Army Court of Military Review is reported at 21 M.J. 559 (ACMR, 1985) (Appendix B).

JURISDICTION

The judgement of the Court of Military Appeals was entered on July 27, 1987, affirming petitioner's conviction dated January 5, 1984. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1259.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitution of the United States provides:

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a ...public trial, by an impartial jury...and to be...confronted with the witnesses against

him...and to have the assistance of Counsel for his defense."

STATEMENT OF THE CASE

On December 8, 1983 and January 3, 4, and 5, 1984, the appellant was tried by a general court-martial composed of officer and enlisted members at Mannheim, Federal Republic of Germany.[1]

He was charged in six specifications of committing lewd and indecent acts with three young German girls, aged 7-12 respectfully. He was convicted of the foregoing specifications and was sentenced to a dishonorable discharge, confinement at hard

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1. On 1 March 1984 an additional Article 39(a) session was held during which the appellant relieved his civilian defense attorney from handling the post-trial matters in his case and had a military attorney detailed to do so. On March 9, 1984 a hearing was held regarding the appellant's case pursuant to United States v. DuBay, 17 USCMA 147, 37 CMR 411 (1967), on matters which will be discussed, infra.

labor for five years, forfeiture of $596.00 pay per month for sixty months, and reduction to the lowest enlisted pay grade. The convening authority approved only so much of the sentence as provides for a dishonorable discharge, confinement at hard labor for three years, forfeiture of $400.00 pay per month for three years, and reduction to the grade of Private E-1.

The victims, three young German girls between the ages of 7-12, plus a fourth young German girlfriend, testified at trial essentially that over a four month period in 1983 they visited the appellant's apartment window, (and inside his military apartment complex) next to a playground in West Germany, where he appeared before them dressed only in a green bath towel, which he removed and stood before them naked, that he masturbated in their presence and committed other acts of exibitionism, etc. (See, R. 73-75, 87-89,

112, 122-125, 128-132, 144-153.) In defense the appellant categorically denied any wrong doing at all with the four German girls. He admitted he called them to his window, because they were obviously poor, and that he frequently chatted with them and gave them money and cigarettes in small amounts. He terminated his relationship with them, however, shortly before his arrest because he suspected they ripped a window screen in his apartment, and one of them made a sexual comment to him. (R. 352-358, 360-361, 374-378.)

REASONS FOR GRANTING THE WRIT

Although this Court has been extremely reluctant in the past to extend its review of court-martial convictions beyond the question of jurisdiction, Congress, in 1983 enacted Pub. L. 98-209, Sec. 10(a), 97 Stat. 1405 (28 U.S.C. Sec. 1259 (3), Supp II, 1984), which provided for Supre-

me Court review by certiorari of certain military cases, including cases "in which the Court of Military Appeals granted a petition for review under section 867 (b) (3) of Title 10 (Article 67(b) (3) of the Uniform Code of Military Justice). The present case is such a case.[2]

Specifically, it is an Art. 67 (b) (3), UCMJ case, a case which was reviewed "by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals

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2. The issue involved before the Court of Military Appeals was: Whether the Military Judge during the trial of the case erred to the substantial prejudice of appellant when the trial judge instructed the prosectution to refresh the recollection of one of the three German victims (who was testifying for the prosectution on direct testimony at the time and who was having difficult recalling events in her testimony) outside the presence of the jury during the noon-time recess in the prosecutors's office. The exact transaction in this regard is covered in more detail, infra.

...granted a review." It is submitted here that this Honorable Court should grant review in this case because the Court of Military Appeals in affirming the accused's conviction in this case has "so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Rule 17, Rules of the Supreme Court of the United States.

The Court of Military Appeals ruled in the present case that the error involved, if any, did not prejudice the substantial rights of appellant because appellant's counsel did not object to the procedure at the trial, and it otherwise, was not "plain error," i.e., it was not "real", "substantial", nor did it result "in a miscarriage of justice". See Appendix, 7. The Court of Military Appeals

further ruled that the right of confronta - tion under these circumstances was not violated (i.e., where the witness' recollection was indeed refreshed during the noon recess in the prosecutor's office, in the absence of the accused, the military judge, the jury, the defense counsel and court reporter, and where her post-refreshing or afternoon testimony was much more detailed and incriminating than her pre-refreshing or pre-noon testimony.

The Court of Military Appeals ruled that appellant's counsel "had more than adequate opportunity to confront the witness; he simply elected not to do so." The Court of Military Appeals further ruled that appellant's counsel "could have cross-examined...on the contents of the statement to elicit whatever impeaching matters it contained. He was also priviledged to point out to the (jury) the fact that her memory had been refreshed by the

document." (Emphasis added.) Appendix, 8. By referring to the refreshing of the witness' recollection as something that was contained in a "statement" or a "document", the Court of Military Appeals was implying that the refreshing procedure used in this case was confined to the four corners of the witness' prior Article 32 testimony. This is a gratutious inference by the Court of Military Appeals. The real threat to the militry judicial process by permitting a prosecutor to refresh a testifying witness' recollection in camera, so to speak, in the confines of the prosecutor's office over the noon time recess, etc., lies in the fact that the prosecutor's words or directions to the witness in this regard are not reflected on the record, they are not even heard by the judge, the accused, the jury, the Court reporter, or the defense counsel, and if they were indeed illegal or pre-

judicial comments involved, no amount of cosmetic surgery by an appellant court can gloss over or properly access their damage to the substantial rights of the defendant in this regard.

Another significant defect in the Court of Military Appeals' judgement in this case, and indeed its most gross defect, lies in the bland pronouncement by that court that error did not occur because the appellant's lawyer did not object or that "plain error" did not occurr--and that there was no violation of the confrontation clause of the Sixth Amendment because appellant's counsel had "more than adequate opportunity to confront the witness," but "simply elected not to do so." Appendix, 8.

This assertion by the Court of Military Appeals also suggests that the right of confrontation lies with the defendent's lawyer as opposed to the defendent him-

self. If the lawyer were competent there may be substance in the court's suggestion, but where the lawyer was shown to be highly ineffective the words of the Court of Military Appeals in this context are simply incongruous to the point of intellectual dishonesty. The Court of Miiitary Appeals, in the case involved, was confronted with a trial record that was replete with instances of gross incompetence on the part of the appellant's trial defense counsel.

It is true that the Court of Military Appeals elected not to review the issue of attorney incompetence, and thereby silently affirmed the Court of Military Review's ruling that the trial defense counsel was not incompetent. But it is submitted that by doing so it still cannot divorce that alleged incompetence, or insulate that

incompetence, from its later ruling on the issue which it did accept for review, where that issue related to or touched the question of attorney competence. In such circumstances the higher court should aff--irmatively justify or comment upon the alleged incompetence of trial defense counsel--particularly where it relates to the question of "plain error," as it surely does here.

The overall inadequacy of the trial defense counsel and the failure of the court of Military Appeals to acknowledge that factor openly and frankly, or even to discuss it in its resolution of the certified issue before it at the time this case was resovled by the Court has resulted in a miscarriage of justice, or a departure from the accepted and usual course of judicial proceedings to such an extent as to call for this Court's exercise of it's supervisory powers to correct this matter.

The inadequacy of the trial defense counsel and the failure of the Court of Military Appeals to address that issue in its resolution of plain error as it related to the constitutional issue of confrontation etc., that was before it at the time of its decision in this case are set forth in more detail below.

I. THE APPELLANT WAS REPRESENTED BY INEFFECTIVE COUNSEL.

a. The Towel Defense.

Mr. Edward J. Bellen, a civilian attorney practicing in Germany was privately retained by appellant. At his trial appellant released his assigned military defense counsel (who had represented him at the Article 32 investigation), and proceeded with the services of Mr. Bellen alone to defend him before a military jury composed of officers and very senior enlisted men (R. 5). Mr. Bellen did not

voir dire the jury, despite the fact that one member of the panel had read an offense report in the case, and another had what was described as a "close" working relationship to the two prosecutors in the case (R.48, 49).

Mr. Bellen furthermore exercised no challenge for cause, or no premptory challenge (R.49). He kept an equally low profile during the government's direct examination of the young German girls (i.e., the victims) in question. Mr. Bellen failed to notice two jurors who were sleeping or had their eyes closed during the trial. He failed to see records of two inadmissible previous convictions in exhibits which he introduced to the jury. He offered no objection to numerous leading questions, or questions that called for the opinion of the German girls, or that called for hearsay. (See,

e.g., R. 91, 92). And he also went to sleep during a significant portion of the government's case, or gave the appearance of doing so (a matter which will be commented upon in more detail, infra).

The foregoing "low-key" trial tactics, it will be assumed arguendo were deliberate trial strategy on the part of Mr. Bellen. It may also be assumed that Mr. Bellen's trial tactics when coupled with his cross-examination of the young German girls in this case, which developed many contradictions in their testimony, would have indicated that he was in control of his case and was quite possibly following an organized trial plan, despite the existence of the foregoing errors on the part of Mr. Bellen. But unfortunately for the appellant there was a downturn in Mr. Bellen's performance when he presented the defendent's evidence and the defendent witnesses to the jury.

Following the close of the government's case Mr. Bellen apparently gave up his "low-key" defense plan and rather than rest his case upon his client's testimony and his credibility as a Sergeant Major with twenty-five (25) years in the Army, as he could have done, he elected to make an affirmative issue out of the fact that the appellant wore the bath towel concerned, and previously referred to herein, not simply in talking to the German girls through his apartment window (a matter which could have been downplayed), but that he also wore the towel in front of his children's teenaged American girlfriends (a matter which could have been omitted from defense evidence altogether).

That his determination to put on his "towel" defense was a blunder in Mr. Bellen's trial strategy can hardly be disputed. After electing to put on this defense, Mr. Bellen also inexplicalby fai-

led to prepare his witness for the onslaught of loaded questions on this subject that could have been expected from the prosecutor and court members themselves. This can easily be seen from the testimony of Mr. Bellen's first witness, Miss Anita Smith, a 17 year old girlfriend of the accused's daughter. Miss Smith on direct examination testified she frequently visited the appellant's home. She was shown the green towel that the appellant wore and questioned on direct examination by Mr. Bellen as follows:

> Q. Okay. What does that represent?
>
> A. That is the towel that the Sergeant Major wears around the house
>
> Q. And you've seen him wearing it around the house?
>
> A. Yes. (R. 180.)

This constituted Mr. Bellen's full examination on this subject. It should have been expected, of course, that the witness on cross-examination would down-play the significance of the towel. But this, however, was not to be.

On cross-examination the witness was asked questions about the towel that filled some two pages of the transcript. On cross-examination she testified that the first time she saw the appellant in his towel it was more or less by accident, when she and his daughter walked through the house "and he was sitting in the chair in a towel." She testified she didn't notice him until she passed him and then her reaction was "oh, no". She was asked if she was embarrassed and she replied "yeah". She said once thereafter when she entered his home, his daughter stopped her and warned her that her father was wearing the towel and offered to have him change

it if it embarrassed her. She replied on one occasion that it would embarrass her and asked the daughter to have him change clothes (R. 190, 191).

Miss Smith further testified on cross-examination that the daughter always warned all of her girlfriends about her father's proclivity to wear the towel before they entered her home. Moreover, she further testified that on one occasion she herself did not enter the house at all because the appellant was wearing the towel (R. 191). A court member asked her how she felt about the appellant wearing the towel and she replied it was their home and they could wear whatever they liked, and while it did not "bother" her it did "embarrass" her (R. 196).

Almost unbelievably, Mr. Bellen did not pick up on the danger signs of this issue (i.e., that he had come dangerously close to proving that his client was

possibly a dirty old man whose own daughter had to warn her teenage girlfriends of his embarrassing state of dress before bringing them into her home, etc.). Instead he called the appellant's two children and two more female teenage dependents who testified how they observed the appellant wear his towel around the home. One of these witnesses, a girlfriend of the appellant's daughter, was asked on cross-examination if her parents knew that Sergeant Major Haston wore just the towel in her presence while she visited his home and she replied in the negative (R.220). The real folly, however, of Mr. Bellen's decision to prove that Sergeant Major Haston wore his green bath towel in front of female American teenagers who visited his home was not brought out until Mr. Bellen called his first two character witnesses for the appellant.

Command Sergeant Major Thomas testified to the appellant's good character. But on cross-examination when questioned about the towel the following testimony ensued:

> Q. Would you be surprised to hear that Sergeant Major Haston often wore this (towel) and just this in front of teenaged girls who often visited his house and the German girls who were coming to his house?
>
> A. I would be very surprised.
>
> ***
>
> Q. Okay. Would you approve of (your daughter) going to another man's house with him wearing this?
>
> A. No, I would not. (R. 254).

The second character witness for the appellant, Staff Sergeant Abram Barnes, was equally devastating. On cross-examination he was shown the appellant's green towel and asked:

> Q. Would it surprise you to hear that Sergeant Major Haston wore this and only this in the presence of teenage girls.
>
> A. Yes Sir. It would. (R. 264.)

The culmination, however, of course, of a spiked defense case (a case that might have been won by the defense) occurred when Sergeant Major Haston testified in his own defense that he always wore undershorts under his bath towel (R. 351), only to be followed in rebuttal by his <u>two children</u> who testified or intimated he wore <u>nothing at all under the towel!</u> (R. 459 and R. 462). Mr. Bellen, of course, throughout this entire testimony did next to nothing to block the avalanche. The final coffin nail in this regard came when the government called a psychiatrist who testified that a person who would wear a bath towel in front of his daughter's friends would demonstrate "a suspicion of

exhibitionism..." (R. 434).

Thus, the wearing of the bath towel by the appellant in talking with the young German girls through the window of his apartment house could have been downplayed, as an isolated event in the appellant's everyday life. Instead, through the negligence of Mr. Bellen the wearing of the towel became the central issue in the case. In fact, it took over the case, even to the point where one court member asked the appellant on cross-examination didn't he feel that he might be charged with indecent exposure because he wore the towel under those circumstances (R. 405-406). (These questions are contained in the record of trial as Appellant Exhibits). The importance of the towel was of course hammered by the prosecutor during her closing argument. She argued persuasivley that the "defendant wore <u>no underware</u> under the towel and if he had

his son would have seen them...Somebody would have seen them. They just weren't there." (R. 499). The prosecutor told the jury to use its

> experience your common sense... The towel is extremely important. Not just because the girls saw him wearing the towel and not just because the teenage girls saw him wearing the towel but because there is a significance in an adult male who wears a towel with nothing else on around teenage girls...Use your common sense...and apply that to the rest of the testimony you've heard. (R. 500).

Mr. Bellen did not contradict this argument and it is submitted that it in turn convicted his client.

Mr. Bellen therefore probably destroyed his client's credibility when he elected to pursue this defense, or to magnify it beyond reasonable proportion. He did so needlessly without regard for consequences and without apparently thinking it

through or preparing his witness to answer barbed questions about the matter. It may thus well be that Sergeant Major Haston had a silly, or innoculous habit of wearing a large bath towel after showering on his return from work and in a lax moment perhaps wore the towel in front of his daughter's teenage girlfriends. But even so, it still was not an item of evidence that should have been introduced by his defense counsel. Mr. Bellen's negligence in submitting evidence of this nature--and his persistence in doing so even after his case began tumbling down about him, was simply inexcusable from the view of acceptable trial tactics. Hence, there is an excellent chance that it was Mr. Bellen's defense witnesses who convinced the jury that Sergeant Major Haston was a "dirty old man," or a sexual pervert, simply because he wore a bath towel and only a bath towel wrapped around his waist in

front of his daughter's teenaged American girlfriends.

Thus, the status of the "spiked" defense is reviewed here not to suggest that Mr. Bellen was deficient to the point of reversible error in his presentation of the "towel" defense alone, but only to establish the total circumstances of his defense. In reviewing ineffectiveness claims "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances"--that is, a reviewing court "must consider the totality of the evidence." Strickland v. Washington, __ U.S. __ , 104 S. Ct. 2052, 2065, 2069, (1984). (Emphasis added.) Thus, the "spiked" defense, or the "towel" defense is reviewed here primarily to furnish insight into "all of the circumstances" of Mr. Bellen's representation or "the totality" of the evidence prior to discussing a specific error made by Mr.

Bellen which it is submitted, did reach constitutional (as well as "plain error") proportions, and which when viewed against the backdrop of his overall performance, should have required affirmative comment by the Court of Military Appeals in resolving the "plain error" issue against the appellant. That legal error on Mr. Bellen's part is simply that he went to sleep during the trial, or at the very least, during a substantial portion of the trial admittedly closed his eyes, and gave that appearance (and was hence unable to observe what was going on in the courtroom around him).

b. The Sleeping Counsel Issue

The introduction of the sleeping (or inattentive) counsel issue into the case is found at page 143 of the record of trial where the following testimony is recorded:

MJ: This is side bar conference. Present are counsel for both sides, the accused, the court reporter and the military judge.

Mr. Bellen, are you feeling all right?

IDC: I am okay.

MJ: I just wanted to make sure.

You look like you were having a little bit of a problem there.

IDC: No, I am okay. Thank you your Honor, I am fine.

MJ: Thank you sir. (The side bar conference terminated 1606 hours, 3 January 1984).

When the above conference took place the government was in the midst of presenting its case. One of the four young German girls was testifying at the time. At a DuBay hearing that was ordered following the conviction of the appellant, which was called in part to inquire into the meaning of the above matter, one court member, Sergeant Major Robert Woodards, testified that he didn't know whether Mr. Bellen was

asleep or not but he appeared to have his eyes closed. (DuBay, R. 73). "I don't know if when he had his eyes closed if he was asleep or if he was meditating or what. I do know, I noticed his eyes were closed and that's all." (DuBay, R. 76).[3]

Mr. Bellen was questioned by the military judge at the DuBay hearing as to his possible mental or physical fatigue during the trial of the case. Mr. Bellen responded that he was not fatigued in either respect, and pointed to his "thorough" crossexamination of government witnesses as proof of his point. (DuBay, R. 15.) He admited, however, that he failed to see inadmissible and damaging evidence against his client in the introduction of defense

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[3] United States v. DuBay, 37 CMR 411 (CMA 1967).

exhibits (referring to two summary court-martial convictions that were not otherwise admissible but which through his oversight were given to the court members in the midst of other defense documents). (See, DuBay hearing R. 5, R. 16-17.)[4]

Mr. Bellen stated he was in good physical condition and that he ran some 10 miles a day (DuBay, R. 15), but admitted that he did not see the inadmissiable summary court-martial documents in his defense exhibits. He further stated that neither did his client, the prosecutor, or the military. (DuBay, R. 17.) He further testified in answer to defense examination, that on the morning of the trial he

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4 The Staff Judge Advocate in his post-trial review of the case found Mr. Bellen's failure to exclude the summary court data from his defense exhibits as incompetence, and recommended that the sentence be reduced from five to three years because of it. The convening authority reduced the sentence accordingly.

had just returned from the United States, but that he slept during "part of the day" prior to trial. (DuBay, R. 17.)

The assigned military defense counsel asked Mr. Bellen about his being called to the bench during the trial of the case, and asked him if he recalled that incident. (DuBay, R. 18.) Mr. Bellen responded and stated that it was his "guess" that he "was sitting there with my eyes closed," and added "I believe that is exactly what it was." (DuBay, R. 18, 19.) He further asserted "I was deliberately sitting there doing that. My guess is that the judge saw that and that he just wanted to know." He further stated he was not tired, that he had run ten miles before the session, that he was "pumped up," and ready to try the case.(DuBay, R. 19.)

Upon questioning by government counsel at the DuBay hearing, Mr. Bellen admitted that he was "sure" that he had appeared as though he were inattentive during the trial. When asked if this was a trial tactic he answered:

> Yes, I've done it many times. I'll probably do it this afternoon. Come on up to Frankfurt and you'll see it. I teach other lawyers to do it also. As a matter of fact, I believe you recall hearing me give that info mation out at a conference on a couple of occasions. In fact you told me that you do the same thing. (DuBay, R. 33).

Mr. Bellen thus asserted that he was not inattentive at "any time during the trial," and the "the best way to check it out is to read my cross-examination of your witnesses." (DuBay, R. 33.) (Emphasis added.)

At the DuBay hearing, R. 10, Mr. Bellen also summed up his trial tactic in this regard. He asserted that he used the

tactic himself and even taught other lawyers to do the same thing. His reason was:

> When the other side is doing something adverse to your side the court members will invariably look to you because they want to see your reaction. In this case, I had four girls who were giving very damaging testimony against Sergeant Major Haston and, I can assure you, I sat right there and closed my eyes too. But I do this for a different reason, I'm sure, than a court-member (who might close his eyes during trial). I just do it so that when a court member looks at me they're going to see that I'm not particularly interested in what's going on, particularly this damaging testmony...and...my experience is, the court members are impressed with this.

Moreover, at the DuBay hearing, R. 14, Mr. Bellen not only spelled out his reasons why he closed his eyes during the appellants trial, but stated when he did so, (i.e., the period of time during the trial when he closed his eyes), as follows:

> I told you before that I sat here during--nothing against Captain Prugh, here when she was conducting her brilliant direct examination, but I sat there and while she went through all of those girls and all of that damaging testimony came out. I wanted to appear that I was not interested. (Emphasis added).

Thus, in point of time it would appear that Mr. Bellen admitted that he not only closed his eyes during the presentation of the Government's case against his client, but that he did so during a substantial portion of that case--i.e., throughout all of the testimony of the four German girls (approximately 100 pages of testimony).

In Javor v. United States, 724 F.2d 831 (9th Cir. 1984), a magistrate found that the trial defense counsel slept through a substantial protion of the trial, but recommended that the conviction be affirmed because the petitioner had not shown specifice prejudice, Javor, supra 724 F.

2d, at 832, 833. The magistrate's recommendation was adopted by the trial court, and on appeal the Ninth Circuit sent the case back to the district court for the magistrate to prepare a more complete record in regard to the issue of trial competence on the part of the trial defense counsel. The magistrate thus made new findings of fact and found that the defense counsel concerned made appropriate motions and objections, conducted a vigorous cross-examination of witnesses and presented an adequate factual defense, and that his overall representation was thus adequate.

The conviction in Javor was reaffirmed and returned to the Ninth Circuit. The Ninth Circuit found that because Javor's counsel was competent when he was awake did not constitue adequate assistance of counsel in the constitutional sense. The Ninth Circuit reversed and held:

> Today we conclude that when an attorney for a criminal defendent sleeps through a substantial portion of the trial, such conduct is inherently prejudicial and thus no separate showing of prejudice is necessary.

724 F.2d, at 833. The Ninth Circuit cited Holloway v. Arkansas 435 U.S. 475, 489-91 (1978), among other authorities, as precedent for its ruling.

In Holloway the Supreme Court was faced with a situation of one attorney representing multiple defendants. The court reasoned that in the ordinary trial where an attorney commits error "its scope is readily identifiable." 534 U.S., 490. "But in a case of joint representation of conflicting interests the evil--it bears repeating--is what the advocate finds himself compelled to refrain from doing." In such situations the Court found it impossible to weigh the prejudicial impact, and that a claim of harmless error would

require "unlike most cases, unguided speculation". Thus, the case was reversed without a showing of specific error. (435 U.S., 491).

This same principle, of course, has been repeated by the Supreme Court in other cases, and has most recently been discussed by the Court in United States v. Cronic, __ U.S.__ , 104 S. Ct.2039 (1984), wherein the Court delineated the cases where specific prejudice due to attorney incompetence had to be shown to constitute reversible error. Thus in footnote 25, the Supreme Court in Cronic, at 104 S. Ct. 2047, noted that it had "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting counsel at a critical stage of the proceeding." (Emphasis added). Hence, it can be argued that a client whose attorney was asleep during a substantial period of his

trial was denied the assistance of counsel during a critical period of the trial, and that accordingly, reversal would be required without a showing of specific prejudice. United States v. Cronic, Id., supra, n. 25 In fact, this was the exact ruling of the Ninth Circuit in Javor, where the court held that the magistrate's ruling "of no actual prejudice" is not controlling because the client (with the sleeping attorney) was without "legal assistance during a substantial portion of his trial," and that as such "he is prejudiced as a matter of law." Javor, Id.

It is submitted that the same argument could be made against an attorney who admittedly closed his eyes during a substanial period of his client's criminal trial in order to give the appearance of disinterest, or for whatever reason. As is the case of multiple clients, the "scope" of the error in such situations

would not be readily indentifieable, for there would be no description in the record of things that the attorney failed to observe while his eyes were closed. It would hence be almost impossible to weigh specific prejudice in such cases, and it would indeed require "unguided speculation" even to guess at what rights such conduct harmed or did not harm in a specific case.

The "unguided speculation" element in Mr. Bellen's trial conduct in this regard is exampled not only in its basic absurdity, or in his simplistic and unbelievable self serving testimony as to why he "feigned" sleep, but even more so in an incident that occurred during the trial. At the DuBay hearing Mr. Bellen admitted that during the trial he received a report that two spectators had seen two jurors sleeping,but admitted he did nothing about it. DuBay hearing, R. 9-13, 19, 82-85. Had he

left his own eyes open, it is obvious that he would have been in a better position to observe the sleeping jurors perhaps, and hence in a better position to protect the interests of his client in that regard. He might even have opted for some affirmative action on his part in regard to the sleeping juror issue, etc.

Mr. Bellen was clearly an ineffective counsel who not only failed to object to objectionable documents presented in defense evidence (i.e. the two summary court-martial convictions), but presented a disasterous trial defense (i.e., the towel defense) that completely shattered his client's credibility, and was otherwise quite inattentive (if not asleep) throughout a major portion of the Government's case against his client. As such it is exceedingly difficult to accept the Court of Military Appeals bland statement that the military judge did not commit plain error

when he directed the prosector to refresh a prosecution witness' testimony outside the presence of the jury, etc., simply because Mr. Bellen did not object to the procedure, or that Mr. Bellen's opportunity to be present at that meeting or to cross-examine on that issue otherwise satisfied the appellant's right to confront witnesses in this regard, or to cross-examine witnesses, etc.

II. THE ACCUSED WAS DENIED THE RIGHT TO A PUBLIC TRIAL, TO CONFRONTATION OF WITNESSES AND TO ASSISTANCE OF COUNSEL.

While testifying on direct examination it became apparent that Manuella Zimmerman was having difficulty remembering many of the specific facts surrounding the events that allegedly took place at the appellant's quarters. In view of this difficulty trial counsel asked the judge for a side bar conference during which the

following conversation took place:

MJ: This is a side bar conference. Present are counsel, the accused, the court reporter and the military judge. Captain Prugh?

TC (The Prosecutor): Your Honor, I would like to refresh the witness' recollection. I do not have the German translation of what she stated. I have only the English translation. I would like to have permission to have Mister Hasnain refresh her memory with the testimony from the Article 32 tranlated into German for her to see if that would refresh her recollection.

MJ: I think, if I allow you to do that, I will allow you to do it only out of the presence of the court members. Is there any objection to handling it in that manner?

IDC: (The Defense Counsel): Not in that manner, Your Honor.

MJ: Fine. How much longer do you think that you are going to take on direct examination, Captain Prugh?

TC: I think that it will take

at least another hour.

MJ: I would point out that it is now 11:20. I planned on breaking for lunch at 11:30. So perhaps the way that it might be done, and again I will leave this up to you, Mister Bellen, is take a recess at this particular time and and allow you to refresh the witness's recollection in your office during the recess including the translation, so there is no need for anybody else to sit around. If you wanted to be present, Mister Bellen, I am sure that you could send someone out-

IDC: Are you suggesting--

MJ: I am suggesting that you take a luch break at this particular time and counsel refresh the witness' recollection as she sees fit out of the presence of the court members. Is there any objection to that, sir?

IDC: No objection.

MJ: Okay, fine. Thank you.

(R. 82, 83). The court then recessed for lunch. After lunch, Manuella again took the stand where she was able to testify to more incriminating facts surrounding the alleged offenses of the appellant than she

testified to in her morning testimony 5.

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5 In Manuella's morning testimony she testified she and her girlfriend, Anja, first went to the outside of Appellant's apartment at his window, and that he gave them a pack of cigarettes. She said he was wearing a green bath towel wrapped around his waist, and fastended with a safty pin (R. 74, 75). She recalled being in his apartment but couldn't remember what happened except for the fact that appellant's towel dropped to the floor and he stood before them naked (R. 76, 77). He didn't ask her to touch him, but she did touch his genitals once, but could not recall the details (R. 78). He was frequently naked, however, when they visited him, but could not recall just how many times she visited him in his apartment (R. 79). She admitted she saw Anja kiss the appellant in his basement, but couldn't recall other details (R. 81). After her recollection was refreshed during a noon time recess her ability to recall improved significantly. She testified that she and Anja visited appellant's apartment six or seven times (R. 85); that when she saw Anja kiss appellant in his basement, she also saw her touch him inside his pant leg (R. 87); that the appellant gave her (Manuella) between ten and fifteen marks per visit (R. 88); that appellant gave Anja sex pictures (R. 89); that she (Manuella) touched appellant's penis on two occasions, and that she saw Nicola touch his penis after he exposed himself on one occasion (R. 92).

Military Rule of Evidence 612 provides that a writing may be used to refresh a witness' memory while the witness is on the stand or before the witness testifies. The rule makes no provision allowing for the refreshing of a witness' memory during a recess of the court while a trial is in progress. The obvious intent of the rule regarding the refreshing of a witness' memory during the course of the trial is to have the procedure accomplished while the witness is on the stand in the presence of the accused, his counsel, the trial judge, the court reporter and the jury. This protects the rights of the accused to a public trial, to confrontation and cross - examination, and to the assistance of counsel, and it permits the jury to observe the witness' difficulty in remembering things. The action of the trial judge in the case at bar in permitting the witness' recollection to be refreshed at a trial

recess thus effectively denied the accused his right to a public trial, to the development of evidence against him before the jury, to his right of confrontation of witnesses, to his right of cross-examination and to his right to the effective assistance of counsel.

Rights of confrontation, of course, are basic rights. See Gibson v. Clannon, 635 F.2d 851 (9th Cir. 1980), at 854; United States v. Pinto, 486 F. Supp. 576 (E.D. Penna 1980), at 580; Turner v. Louisiana, 379 U.S. 466 (1965), at 472-73. As stated by the Supreme Court in Turner:

> In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness in a public court room where there is full judicial protection of the defendant's right of confrona-tion, of cross-examination and

of counsel.

Turner, 379 U.S.. 472-473. The same is found in Patterson v. Colorado, 205 U.S. 454, (1907), where Mr. Justice Holmes stated:

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public point.

In United States v. Thomas, 463 F.2d 1061, 1061-62 (7th Cir. 1972), the Seventh Circuit reversed a conviction where a news article, not admitted in evidence, had been used by the jurors in their deliberation. The Seventh Circuit held the use of the article by the jurors denied the appellant his right of confrontation "to fully contest the prosecution's case in the presence of the jury." The Seventh Circuit held an important corollary to

this protection was the requirement "that the jury's verdict be based upon evidence received in open court, not from outside sources" (quoting Sheppard v. Maxwell, 384 U.S. 333, 351 (1966).

Hence, to whatever extent the jury based its verdict upon the afternoon testimony of Manuella Zimmerman, it was in essence a reliance upon testimony that was substantially enhanced (from the morning testimony) by an outside source (i.e., by the prosecutor during her noon-time briefing of the witness, outside the presence of appellant, his counsel and the jury). And it would also appear that to the extent that the jury's verdict was based on Manuella Zimmerman's afternoon testimony, was a reliance upon matters that were not actually received in "open court", or upon matters that were not subject to "full contest" by appellant in front of the jury. Once Manuella Zimmerman had

testified any outside (or non-record or extraneous) change or correction or enhancement of her testimony was thus quite illegal, and in violation of appellant's right to confront witnesses against him--including the prosecutor herself if the prosecutor in fact told Manuella what to say under oath when she resumed the witness stand (or if the prosecutor simply "orchestrated" her testimony during the noon recess). Under the circumstances of this case it is unfortunately quite impossible to deduct how much of Manuella's afternoon testimony (which differed materially from her morning testimony) was her own product or how much of it was the product of the prosecutor.

Thus, it could be said that any verdict in this case which was based in whole or in part upon Manuella's afternoon testimony, was not a verdict that was "induced only by evidence and argument in

open court," nor was it a verdict that came from a witness' testimony "in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination and of counsel."

The Fifth Circuit in Farese v. United States, 428 F.2d 178 (5th Cir. 1970), stated at 179:

> It is fundamental principle that the government has the burden of establishing guilt solely on the basis of evidence produced in the court room and under circumstances assuring the accused all of the safeguards of a fair trial.

As stated by the Supreme Court in Turner v. Louisiana, supra, "it would be blinking (at) reality not to recognize the extreme prejudice inherent in this (situation)." 379 U.S., 473. Moreover, since it cannot be said that "there was no reasonalbe possibility" that the afternoon testimony of Manuella Zimmerman "did not

effect the verdict," or even to ascertain if it did effect the verdict, reversal should follow without regard to showing of specific predjudice. Turner v. Louisiana, Farese v. United States, 428 F.2d, 180, 181.

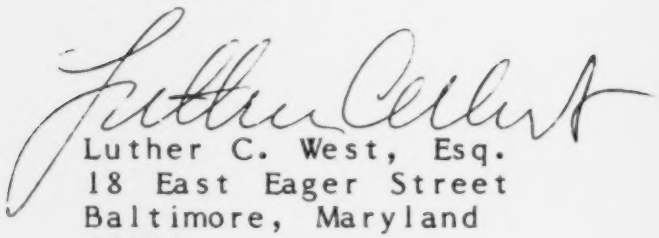
Accordingly, it is submitted that the holding of the Court of Military Appeals in this case that it was proper for the prosecutor to refresh the recollection of Manuella Zimmerman in her office during a noon recess under the circumstances listed above and where the record of trial did not affirmatively reflect the presence of the accused, his counsel, judge, jury and court reporter at that "briefing", is a holding that is in basic conflict with well understood constitutional concepts and should not be permitted to stand by this Honorable Court. To the extent that the trial defense counsel, Mr. Bellen, offered "no objection" to this procedure,

it is submitted is but another example of his gross ineffectiveness, and in no event does it constitute constitutional waiver of the error involved, as such constitutional error may be waived only on a knowing and intelligent showing set forth in the record. Boykin v. Alabama, 395 U.S. 238 (1969).

CONCLUSION

The question presented is substantial and of great public significance. Inferior courts and particularly the Court of Military Appeals, need this Court's guidance concerning the issues involved here. For the foregoing reasons, the petition for certiorari should issue.

Respectfully,



Luther C. West, Esq.
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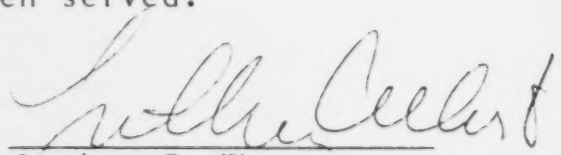
Counsel of record for
Appellant

AFFIDAVIT OF SERVICE

I hereby affirm that on this 7th day of October, 1987, three copies of the aforegoing Writ of Certirari and attached Appendix were mailed to the Solicitor General, Department of Justice, Washington D.C., 20530, Counsel for the Respondent. I further affirm that all parties required to be served have been served.



Luther C. West
Counsel of Record for
Appellant

APPENDIX

UNITED STATES, Appellee,

v.

Billy R. HASTON, Sergeant Major U.S. Army, Appellant.
No. 54, 162.
CM 446165

U.S. Court of Military Appeals

July 27, 1987

Accused, a sergeant major in the United States Army, was convicted by general court-martial, J.M. Marden, J., of six specifications of committing lewd acts on females under the age of 16, and he appealed. The United States Army Court of Military Review, 21 M.J. 559, consolidated several specifications but affirmed sentence approved by convening authority. Review was granted. The United States Court of Military Appeals held that: (1) accused was entitled to relief only if plain error had occured, based on allowing trial counsel to refresh memory of alleged victim, to whom accused had allegedly

exposed himself on a number of instances, during lunch recess, outside presence of members; (2) military evidence rule providing for refreshing witness' memory while testifying or before testifying was not exclusive catalogue of instances under which witness' recollection could be refreshed; and (3) accused's right of confrontation under Sixth Amendment was not violated by permitting trial counsel to refresh memory of victim outside presence of members.

Affirmed.

For Appellant: Luther C. West, Esq. and Captain Richard J. Anderson (on brief). For Appelle: Colonel Norman C. Cooper, Lieutenant Colonel Larry D. Williams, Major Thomas E. Booth, Major Byron J. Braun (on brief); Colonel James Kucera, Lieutenant Colonel Adrian J. Gravelle, Captain John F. Burnette.

PER CURIAM:

Contrary to his pleas, appellant was convicted by general court-martial of committing lewd acts on females under the age of 16, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. On review below, the Court of Military Review consolidatd several specifications but affirmed the sentence approved by the convening authority. United State v. Haston, 21 M.J. 559 (A.C.M.R. 1985).[1]

We granted appellant's petition for

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[1] The members sentenced appellant to be confined for 5 years, to forfeit $596.00 pay per month for 60 months, to be reduced to the lowest enlisted grade, and to be discharged with a dishonorable discharge. The convening authority reduced the term of confinement to 3 years and the forfeitures to $400.00 pay per month for 36 months; however, he approved the discharge and reduction as adjudged. See United States v. Sorrell, M.J. 122 n.1 (CMA 1986).

review to consider whether the procedures used to refresh the recollection of one victim violated appellant's substantial rights.[2] Finding no harm to those rights, we affirm.

Charges were preferred against appellant following allegations of sexual misconduct (indecent exposure, etc.) with a number of preteen German girls. The witnesses were not generally familiar with the English language and testified through an interpreter. One witness, Manuella Z, told of a number of instances during which appellant had exposed himself, but she was unable to recall many of the details of the incidents. Consequently, trial counsel suggested that Manuella be allowed to

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[2] The issue granted was:
WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT WHEN HE INSTRUCTED TRIAL COUNSEL TO REFRESH MANUELLA [Z]'s TESTIMONY OUTSIDE THE PRESENCE OF THE PANEL MEMBERS.

to refresh her memory by having the interpreter translate the transcript of her Article 32[3] testimony from English into German.[4]

In a bench conference called to discuss the matter, the military judge took note of the hour, suggested a lunch recess would be appropriate, and then recommended that refreshing Manuella's memory could take place in trial counsel's office during the break. Individual defense counsel was invited to be present during this refreshing, but declined; he specifically stated he had no objection to the procedure. When trial resumed, Manuella was able to provide the court members with specific details about appellant's behav-

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[3] Uniform Code of Military Justice, 10 U.S.C. § 832.

[4] That statement had been recorded in English only.

ior.

The proper method to be used to refresh the recollection of a witness is well-established. Counsel must establish that the witness has little or no memory of the events to which she is testifying. The witness should then be asked if there is anything which would assist her in her testimony.[5] The object or document should then be marked as an exhibit and shown to the witness who will be allowed to peruse it. Upon the witness' declaration that her memory has been refreshed, her testimony resumes without further reference to the material used. A party opponent is entitled to a copy of the document at that time. Mil. R. Evid. 612, Manual for Courts-Martial, United States, 1969 (Revised edition).

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[5] There is no need for the object or statement used to be directly related to the case at bar so long as it refreshes the witness' recollection.

[1, 2] Before us, appellant argues that since Mil. R. Evid. 612 provides only for refreshing a witness' memory "while testifying," the procedure followed in this case was error. Several observations are germane. The first is that there was no objection to this procedure at trial; therefore, appellant is entitled to relief only if plain error has occurred. United States v. Young, 470 U.S. 1, 15-17, 105 S.Ct. 1038, 1046-48, 84 L.Ed.2d 1 (1985); United States v. Fisher, 21 M.J. 327 (C.M.A. 1986); cf. United States v. Webel, 16 M.J. 64 (C.M.A. 1983). Reversal is required only where the error is real, substantial, or has resulted in a miscarriage of justice.

[3] Evaluating the circumstances of this case, we cannot say that error has been committed, let alone plain error. Appellant's argument concerning Mil. R. Evid. 612 is without merit. That rule is

designed to regulate discovery of documents. An accused's only remedy thereunder is production of the document used to refresh the recollection of the witness. It is not an exclusive catalogue of instances under which a witness' recollection may be refreshed.

[4] Second, appellant contends that his right of confrontation under the Sixth Amendment has been violated. This argument is not well-taken. Appellant's counsel had more than adequate opportunity to confront the witness; he simple elected not to do so. He could have cross-examined Manuella on the contents of the statement to elicit whatever impeaching matters it contained. He was also privileged to point out to the members the fact that her memory had been refreshed by the document.

[5] In view of the foregoing, plain error was not created by either civilian counsel's failure to request that the

witness' recollection be refreshed in the presence of the court members or that the statement used to refresh her memory be entered into evidence.

The decision of the United States Army Court of Military Review is affirmed.

UNITED STATES ARMY COURT
OF MILITARY REVIEW

Before
RABY, CARMICHAEL, and ROBBLEE
Appellate Military Judges

UNITED STATES, Appellee	)	
	)	CM 446165
v.	)	
	)	21st Support Command
Sergeant Major, **BILLY R. HASTON** 450-62-3051 United States Army, Appellant	)	J.M. Marden, Military Judge

Appellant: Luther West, Esquire (argued); Lieutenant Colonel William P. Heaston, JAGC, Major Lawrence F. Klar, JAGC, Captain James E. Girvin, JAGC (on brief); Captain Robert W. Wiechering, JAGC.

For Appellee: Captain John F. Burnett, JAGC (argued); Colonel James Kucera, JAGC, Lietuenant Colonel Adrian J. Gravelle, JAGC, Major Byron J. Braun, JAGC (on brief).

24 October 1985

OPINION OF THE COURT

RABY, Senior Judge:

Contrary to his plea, appellant was convicted of three specification of lewd and lascivious acts with three females under the ages of sixteen, and of three similarly drafter specifications of indecently exposing himself on divers occasions to the same three females. He was sentenced to a dishonorable discharge, confinement at hard labor for 5 years, forfeiture of $596.00 pay per month for 60 months, and reduction to the lowest enlisted grade. The staff judge advocate recommended in his post-trial review that in view of the erroneous admission of two "summary court-martial convictions, adequate relief to the accused would be provided by reducing the period of confinement and period of forfeitures adjudged from five to three years." The convening authority approved only so much of the sentence as provided for a dishonorable discharge, confinement at hard labor for

three years, forfeiture of $400.00 pay per month for three years, and reduction to the grade of Private E-1.

I. Adequacy of Counsel

Appellant asserts that he was denied effectiveassistance of counsel. He maintains that: (1) the conduct of his trial defense counsel was of such a deficient nature as to fail entirely to subject the prosecution's case to a meaningful adversarial testing. This alleged failure resulted in a denial of appellant's Sixth Amendment rights, thus making the adversary process itself presumptively unreliable and requiring no further showing of prejudice. Appellant asserts that counsel by his conduct in effect absented himself from a critical stage of the trial. United States v. Cronic, __U.S.___, 104, S. Ct. 2039 (1984). Appellant argues that his position is established by the conduct of his counsel, Mr. Edward J. Bellen, who he

asserts either "went to sleep during the trial, or at the very least, during a substantial portion of the trial...closed his eyes, (and was hence unable to observe what was going on in the courtroom around him)." See e.g., Javor v. United States, 724 F.2d 831 (9th Cir. 1984). Appellant argues, in the alternative, that: (2) the conduct of his trial defense counsel, under the totality of the circumstances constituted actual ineffectiveness, and that the existence of prejudice is established by matters contained in the trial record. Strickland v. Washington, U.S. , 104 S. Ct. 2052 (1984). Specifically, appellant asserts that defense counsel's ineffectiveness is established by, but not limited to: (a) his incompetence in failing to investigate the so-called "towel defense" before using it in the defense's case; (b) shutting his eyes, dozing or being inattentive during the direct examination of

key government witnesses, and thus failing to observe matter adverse to appellant which occurred during the trial; (c) failing to object to the out-of-court refreshing of one young German girl's memory as to her prior testimony at the Article 32, Uniform Code of Military Justice [hereinafter referred to as UCMJ], investigation; and (d) by his erroneous introduction into evidence during the presentencing proceedings of records pertaining to appellant's military service which, through oversight included evidence of two 20-year-old summary courts-martial.

Allegations that defense counsel and one or more court members had been sleeping during trial, and that discussions may have occurred between certain witnesses and between a court member and a witness, surfaced shortly after trial. These allegations were examined in depth

in a post-trial DuBay[1] hearing. At this hearing, the military judge entered certain pertinent findings of fact. He found, inter alia, that (1) there were no sleeping, dozing or inattentive (court) members at any time during the trial"; and (2) "Mr. Bellen, the civilian defense counsel, was alert and attentive throughout the trial; he was neither sleeping nor dozing; any appearance of sleeping, dozing, inattentiveness or boredom on the part of the civilian defense counsel was a trial tactic to divert the court's attention from opposing counsel or to reduce the impact of adverse government witnesses [sic] testimony";[2] (3) the

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1 See generally, United States v. DuBay, 37 CMR 411 (CMA 1967).

2 Government appellant counsel has called this court's attention to several places in the record of trial which show that new facts were testified to by prosecution witnesses on direct examination, (FOOTNOTE CONTINUED)

conversation occurring between Command Sergeant Major (CSM) Day (a court member) and CSM Thomas (a potential witness), had no impact on CSM Thomas' subsequent testimony or on CSM Day's deliberations, and no prejudice was suffered by appellant due to the conversation to the attention of the military judge because he was satisfied it was harmless, if not favorable, to the accused; and (5) there was no credible evidence of any conversations during the case by witnesses about their testimony that materially or substantially could have affected the case.

Because appellant has not presented sufficient evidence to convince this court to set aside any of the military

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2 FOOTNOTE CONTINUED
and that later during cross-examination, Mr. Bellen could, of course, not have accomplished this feat if he had been sleeping at the time the new material was introduced.

judge's findings of fact at the DuBay hearing, we expressly affirm all of those findings and adopt them as our own. See generally, Ariticle 66 (c), UCMJ; cf. United Statesv. Stark, 19 M.J. 519, 522 (ACMR 1984), pet. granted, No. 51666/AR (CMA 23 Sep. 1985)(In clarification of certain controverted questions of fact, this court make express findings of fact pursuant to its statutory authority).

Considering the totality of circumstances in this case, we find that appellant was not denied, either actually or constructively, the presence of counsel at a critical stage of the prosecution, i.e., counsel was not constructively absent during any critical stage of the trial. Further, we find that, based on the actual conduct of the trial, there was no breakdown in the adversarial process that would justify a presumption that appellant's conviction was insufficiently reliable to satisfy the require

ments of the Constitution. See, e.g., United States v. Cronic, 104 S. Ct. 2039. Stated another way, we find no evidence that defense counsel "entirely fail[ed] to subject the prosecution's case to a meaningful adversarial testing," which would result in "a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."[3] See generally, United States v. Cronic, 104 S. Ct. at 2047.

Because we have determined that Mr. Bellen neither was asleep nor inattentive during appellant's trial, we also find

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3 We note that defense counsel had a definite trial strategy which he followed in presenting appellant's case to the court-martial. The court, at appellant's request, included both officer and enlisted members. Defense designed to show that the government's witnesses were not trustworty and that due to a lack of opportunity and because of his good moral character, it was unlikely that his client committed the offenses charged. Further, Mr. Bellen presented a detailed argument on behalf of his client tailored to this trial strategy.

this case is clearly distinguishable from Javor v. United States, 724 F.2d 831.

A cornerstone principle in determining whether an accused was adequately represented by counsel depends upon whether, considering the totality of the circumstances, the counsel provided the accused with reasonably effective assistance of counsel throughout the trial. Strickland v. Washington, 104 S. Ct. at 2064-2065; see McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970). In a court-martial, an appellant enjoys the right to the effective assistance of counsel and is entitled to "reasonably competent counsel who exercises that competence in his client's behalf throughout the trial." United States v. Jefferson, 13 M.J. 1, 5 (CMA 1982); United States v. Rivas, 3 M.J. 282, 287 (CMA 1977).

In cases involving actual ineffectiveness claims,[4] Strickland provides that:

> First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness [and was thus deficient]...In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.
>
> Second, "[c]onflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.

Strickland v. Washington, 104 S. Ct. at 2065, 2067.

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[4] This category of ineffectiveness claims excludes those claims involving "[a]ctual or constructive denial of the assistance of counsel altogether," as well as conflict of interest claims. These latter claims, which we have determined are not applicable here, are established by an accused meeting a different burden of proof. See Strickland v. Washington, 104 S. Ct. at 2067; United States v. Kidwell, CM 443582, slip op. at 4-5 (ACMR 18 Sep. 1985).

The test for actual ineffectiveness of counsel[5] established by the United States Court of MilitaryAppeals in United States v. Jefferson, when viewed in toto is "congruent with the Strickland requirement of breach of professional competence coupled with a showing of a 'reasonable probability' of outcome-determinative prejudice." United States v. Kidwell, CM 443-582, CM 445165, slip op. at 6; United States v. Jackson, 18 M.J. 753, 755 (ACMR 1984) (citing Strickland with approval); but compare United States v. Scott, 18 M.J. 629, 632--633 (NMCMR 1984) (Cassel,

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[5] In United States v. Jefferson, 13 M.J. at 5, the court after carefully articulating appellant's right to effective assistance of counsel, as discussed in the above text, adopted the test of United States v. DeCoster, 624. F.2d 196 (D.C. Cir.), cert. denied, 444 U.S. 944 (1979). This test requires that before an accused can prevail in the issue of ineffectiveness of counsel, he must demonstrate: (1) "serious incompetence" on the part of his attorney; and, (2) counsel's inadequacy affected the trial results.

J., concurring) (which finds a difference between Strickland and Jefferson standards) with United States v. Garcia 18 M.J. 716 718-720 (AFCMR 1984) (which by implication finds no inconsistencies between the Strickland and Jefferson standards) and United States v. Garries, 19 M.J. 845, 863-865 (AFCMR 1985).

In determining whether counsel's assistance throughout the trial was reasonable under the existing circumstances, the following principles also apply: (1) appellate courts normally should not be quick to second-guess the strategic or tactical decisions of trial defense counsel, especially when the strategy used or tactics employed are not on their face unreasonable or unworkable, see United States v. Jones, 18 M.J. 713, 714 (ACMR 1984), citing United States v. Rivas, 3 M.J. 282; (2) "[i]ssues of professional competency and adequacy or representation are not inextricably bound to trial re-

sults", United States v. Jones, 18 M.J. at 715; (3) "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result", Strickland v. Washington, 104 S. Ct. at 2064; (4) "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight"; id. (5) a presumtion exists that counsel will fulfill the role in the adversary process that the Sixth Amendment envisions; id. (6) a "strong presumption" exists that "counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances the challenged action 'might be considered sound trial strategy'" and "counsel

error is without merit.6

II. Inadmissiblity of Two Summary Court-Martial Convictions

Appellant asserts that the military judge erred by failing to rule sua sponte that the evidence of the appellant's two prior summary court-martial convictions was inadmissible.

Appellant prepared two black binders filled with various documents pertaining to his military career. These binders, containing over one hundred and fifty pages, were offered in evidence during the presentencing proceedings by appellant's counsel. Apparently unknown to the appellant, his defense counsel, and the military judge, the fourth page of one of the admitted documents reflected

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6 We also find that appellant has affirmatively failed to establish that he suffered any prejudice, due to the "attorney performance" of Mr. Bellen, which affected the findings in his case.

appellant's two previous convictions by summary courts-martial, dated 22 September 1961 and October 1962, respectively. The convictions were for disrespectful language to a noncommissioned officer and for a one and one-half hour unauthorized absence, respectively.

Before announcing sentence, the president of the court informed the military judge that a discrepancy had been discovered by the members. This colloquy is as follows:

> PRES: [W]e have discovered a discrepancy from some of the personal data that I would like to bring to your attention, sir. On the DD Form 493, the Record of Previous Conviction indicates none.
>
> MJ: That's correct.
>
> PRES: In one of the black books there is a DD Form 398, Statement of Personal History, that indic ates a couple of summary courts martial.

MJ: All Right. Thank you for bringing that to my attention.

PRES: We have no idea whether that has any bearing or not.

(Emphasis supplied.)

Subsequently, the assistant trial counsel requested a sidebar conference to discuss the problem, at which time the following verbal exchange occured:

MJ: I would also note that this is a defense document. And for that reason, I believe nothing is appropriate to be done about it at this time. Any comments, Mr. Bellen?

IDC: No, sir.

Thereafter the sentence worksheet was returned to the president who forthwith announced sentence.

The presentation of the evidence of the two summary court-martial convictions is a classic case of an error induced by the defense.[7] The staff judge advocate

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[7] Although a single error of omission by FOOTNOTE CONTINUED

was clearly concerned about this error. In fact, he made the following pertinent conclusions in his well-tailored post-trial review to the convening authority:[8]

> There is some possiblity the two prior summary courts-martial might have influenced the decis- of the court as to the period of confinement and/or period of forfeiture [sic] adjudged. Balancing the seriousness of the offenses and the accused perjury at his trial against his previous excellent record and the erroneous admission of the summary court-martial convictions, adequate relief to the accused would be provided by reducing the period of confinement and the period

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7 FOOTNOTE CONTINUED
defense counsel may in some situation constitute ineffective assistance, see Jackson v. State, 37 Cr. L. Rep. (BNA) 2417 (Tex. Crim. App. Jul. 24, 1985), we find that his error, standing alone, does not rise to such a level. Moreover, as we have concluded in Section I, supra, neither does this error rise to such a level when considered in light of the totality of the circumstances attendant to this case.

8 The staff judge advocate discussion was quite thorough and was almost three type written pages in length.

of forfeitures from five years to three years.

We find that the convening authority followed this sound advice by his staff judge advocate. In fact, after considering the entire record, he approved only so much of the adjudged sentence as provided for a dishonorable discharge, confinement at hard labor for three years, forfeiture of $400.00 pay per month for three years, and reduction to the grade of Private E-1.

We initially note that the nature of the offenses for which appellant received summary courts-martial do not appear to constitute major offense per se; that the summary court-martial convictions were over 20 years old; that the 1962 amendments to Article 15, UCMJ, (which substantially increased a commander's non-judicial punishment authority) were not yet in effect when appellant was subjected to the summary courts-martial; and,

that prior to announcing sentence in this case, the president expressed that court's confusion as to the legal effect of these prior convictions. Considering also that appellant was at the time of trial a Sergeant Major (E-9), we find that the court attributed no significant weight to the entries in appellant's personnel records that reflected these old convictions. Nevertheless, ex abundanti cautel, we will resolve this question in favor of appellant by assuming that the court members gave this information some weight in their deliberation on sentence.

We further find that the action of the convening authority in this case constituted a substantial and meaningful reduction of appellant's adjudged sentence and, thus, rendered harmless any error caused by the defense counsel's introduction of the offending record into evidence.

Our inquiry into this matter normally would now be ended; however, appellant maintains that the military judge's failure to rule sua sponte that the evidence of appellant's prior convictions was inadmissable created a separate error warranting sentence rehearing.

We note that Mr. Bellen expressly declined to comment upon the military judge's conclusion that no further action on the judge's part was appropriate after the court president called the judge's attention to this error. We are mindful of the doctrine of defense-induced error. See generally, United States v. Catt, 1 M.J. 41, 47 (CMA 1975), and cases cited therein. However, considering the posture of the case at bar, and the necessity for ensuring that appellant received a fundamentally fair presentencing proceeding, we decline to apply the doctrine of defense-induced error in this instance.

We find as a fact that the president of the court was actively seeking the legal guidance of the military judge when he called the judge's attention to the adverse entries in the defene's exhibit. It has long been recognized that a trial judge must tailor his instruction on sentencing to both the law and the evidence. See United States v. Slaton, 6 M.J. 254 (CMA 1979), and cases cited therein; United States v. Rick, 9 M.J. 776 (AFCMR 1980). Moreover, "court members must be instructed concerning reconsideration when...there is some indication that reconsideration is desired by a court member." United States v. Cross, 2 M.J. 1057, 1061 (ACMR 1976), pet. denied sub nom. United States v. Sepulveda, 3 M.J. 108 (CMA 1977) (emphasis supplied). Even in a case where the military judge initiates reconsideration, "the military judge has the responsibility to insure that the reconsideration is conducted in accorda-

nce with adequate legal guidelines. If the members seem uncertain about their authority or the options available to them, he must provide additional guidance." United States v. King, 13 M.J. 838, 841, (ACMR 1982), pet. denied, 14 M.J. 232 (CMA 1982).

In this instance it should have been clear to the military judge that the court members were requesting additional legal guidance regarding the evidence pertaining to appellant's summary court-martial convictions. Had the members promptly been advised before sentence was announced that these documents were inadmissible, they well may have indicated their desire to reconsider their sentence to appellant's benefit, or to make statements which would have prompted the military judge to initiate such a reconsideration action.

We will not speculate either as to the court members' or to the judge's conduct in such circumstances; rather we will resolve this matter in appellant's favor by holding that the military judge, under the facts of this case, erred in failing to inform the court members that the evidence of the two summary courts-martial was inadmissible.

Testing this error for prejudice, we are convinced that no fair risk exists that appellant was prejudiced. See Article 59a, UCMJ: cf. United States v. Cobb, 7 M.J. 696 (NCMR 1979) (error in the failure to instruct, however, must be tested for prejudice). Assuming, arguendo, that the court members did attach some degree of significance to these two old summary court-martial convictions, we find that the action of the convening authority in substantially reducing both the period of confinement and the amount and period of adjudged forfeitures tota-

lly negated any fair risk of prejudice to the accused.[9] See United States v. Bashaw, 6 M.J. 179 (CMA 1979).

Accordingly, we find this assignment of error to be without merit.

III. Refreshed Testimony

Appellant alleges that the military judge erred by allowing the trial counsel to refresh the testimony of one of the young girls victimized, Manuela Zimmerman, outside the presence of the court members. We disagree.

Manuela Zimmerman was eleven years

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[9] Appellant urges that the corrective action taken by the convening authority in response to the recommendations contained in the staff judge advocate's post-trial review should be considered as correcting only the defense counsel's error in initially offering the adverse evidence to the court. We decline to take such a stenotic approach; rather, we choose to evaluate realistically the effect that the convening authority action had upon appellant. When we make such an evaluation and balance it against the nature of the error under consideration, it becomes clear to us that we have properly resolved this issue.

old at the time of trial. She spoke very little English and testified through an interpreter.[10] On direct examination, Manuela stated that she did not remember specific facts about what had occurred. She could not remember how many times she had visited appellant's apartment nor could she recall how many times she had touched him. Trial counsel then, at a sidebar conference, asked the military judge to be allowed to refresh Manuela's recollection by the use of her Article 32 UCMJ, testimony. The military judge granted the request, and the trial counsel was allowed to refresh Manuela's recollection with the German translation of her Article 32, UCMJ, testimony in the trial counsel's office during the lunch recess. Appellants' civilian defense counsel, Mr.

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10 The military judge instructed the members that even if they understood German they were not to listen to Manuela's German, but instead to rely on the interpreter.

Bellen, who was invited to attend the session but declined, stated that he had no objection to the procedure. After the lunch recess, Manuela continued to be questioned on direct examination. On cross-examination, Mr. Bellen extensively questioned Manuela, not only about her answers on direct examination but also about her testimony at the Article 32, UCMJ, hearing.

Appellant maintains that the procedure utilized by the military judge failed to follow the dictates of Mil. R. Evid. 612. The Rule provides:

> If a witness uses a writing to refresh his or her memory for the purpose of testifying, either
>
> (1) while testifying or
>
> (2) before testifying, if the military judge determines it is necessary in the interest of justice
>
> an adverse party is entitled to

> have the writing produced at the hearing, to inspect it, to cross-examine the witness hereon, and to introduce in evidence those portions which relate to the testimony of the witness.

Mil. R. Evid. 612.

Appellant maintains that the procedure is to be accomplished while the witness is on the stand and in the presence of the court members. However, we do not believe that the military judge abused his discretion in allowing the trial counsel to refresh Manuela's memory during the lunch recess.

The military judge is given enormous discretion under Mil. R. Evid. 403 to exclude evidence on the ground that its admission would do more harm to appellant than good. The judge had already instructed the members to disregard Manuela's German testimony. Having given such an instruction, one which we believe was

appropriate under the circumstances, was the judge then to allow the members to hear the trial counsel read Manuela's testimony from the Article 32, UCMJ, recalled testifying to that effect; to hear the interpreter translate that statement into German; to hear hearingll; to ask the interpreter translate it into German; to hear the trial counsel ask Manuela if she recalled testifying to that effect; the hear the interpreter translate that statement into German; to hear Manuela respond and then to have the interpreter translate her response into English? We think not. Such a situation is the very sort of situation that Mil. R. Evid. covers. Such a convoluted scenario would do those things the Rule is trying to prevent: confuse the issues, mislead the members, cause undue delay, and waste time. See United States v. Ratliff, 623 F.2d 1293, 1297 n. 8 (8th Cir. 1980). Accordingly, we conclude that the military

judge properly allowed Manuela's testimony to be refreshed outside the presence of the members.

The "fears concerning the 'planting' of ideas with a witness increase the more a witness is focusing on the testimony to be given at trial, [and t]his is more likely to be the case when memory is refreshed immediately before or during the recess of a trial." S. Saltzburg, L. Shcinasi, & D. Schlueter, Military Rules of Evidence Manual, 310 (1981). However, Mil. R. Evid. 612 allows the adverse party to see the document that the witness used to refresh his or her memory, cross-examine the witness thereon and introduce into evidence those portions which relate to the testimony of the witness. By focusing on those portions of the document

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11 Normally, a witness's Article 32, UCMJ, testimony is not presented to the members.

that relate to the witness's testimony, the adverse party may effectively impeach the witness. See S. Saltzburg, L. Schinasi, & D. Schueter, Military Rules of Evidence Manual 308 (1981). By cross-examination based on the document, the adverse party may detect circumstances not appearing on the surface and all that detracts from the weight of the testimony. 3 Wigmore § 762 (Chadbourn rev. ed. 1970).

In most instances, when a witness's memory is to be refreshed on the stand, a writing will be handed to witness who reads it and then gives it back to the questioner.[12] The purpose of refreshing is to awaken, or jog, the memory of the witness and "thereby to increase the evidence available to the trier of fact."

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12 In the case sub judice, the trial counsel had only the English translation of Manuela'a Article 32, UCMJ, testimony which would have been of no use to Manuela, since she did not read English, in refreshing her memory.

A. Saltzburg, & K. Redden, Federal Rules of Evidence Manual 416 (3d ed. 1982). See also People v. Thomas, 102 N.W. 2d 475 (Mich. 1960). In a case where the witness reads the document, its content does not go to the trier of fact unless the adverse party chooses to introduce in evidence those portions of the writing relating to the testimony of the witness. Mil. R. Evid. 612. In cases where the witness is unable to read the document, the members withdraw from the courtroom the statement is read to the witness, as when the the witness is blind or illiterate.[13] See People v. Jones, 137 N.W.2d 748 (Mich. Ct. App. 1965); People v. Thomas, 102, N.W.2d

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13 We note that the trial counsel had only the English translation of Manuela's Article 32, UCMJ, testimony present in the courtroom. Manuela was only eleven years old at the time of trial. She could understand very little English; she certainly could not read it. The English statement alone was of no use to her. By analogy, Manuela was effectively illiterate; consequently, refreshing her testimony out of the presence of the members was proper.

475, and cases cited therein. When a tape recording, rather than a written statement, is involved, judges have allowed the witness only to listen to the statement through earphones, or the have excused the jury and only the accused, counsel and the judge hear the Statement. See Slatinsky v. Bailey, 330 F.2d 136 (8th Cir. 1964; United States v. McKeever, 271 F.2d 669 (2nd Cir. 1959); and Breeding v. Reed, 110 N.W.2d 552 (Iowa 1961). After the witness' memory has been refreshed, direct or cross-examination continues in the presence of the members. In view of the above, we find that the military judge was free to construe Mil. R. Evid. 612 as authorizing the procedure he employed. Mil. R. Evid. 102.

Although we think the better practice would have been for the military judge to have had an Article 39(a), UCMJ, session with the accused, counsel for both sides and the court reporter present, we will

not substitute our preferences for those of the military judge. We find, in this instance, there was no prejudice to appellant by the procedure used.14 Accordingly, appellant's assigment of error is without merit.

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14 We note tha appellant's civilian defense counsel, Mr. Bellen, questioned Manuela extensively and effectively when she returned to the stand to testify following the out-of-court refreshing of her recollection. Counsel, in fact, highlighted the differences between her testimony on direct examination and her testimony at the Article 32, UCMJ, hearing. Counsel pointed out discrepancies in Manuela's testimony concerning which days she had visited appellant. On direct, she said she only saw him on weekends. On cross-examination, initially she said that she had told the Article 32, UCMJ, officer that she only saw appellant on the weekends. Mr. Bellen questioned her further and Manuela admitted that she had also seen appellant during the week. Mr. Bellen also pointed out that Manuela's answeres were different in the morning than they were in the afternoon. Moreover, in his closing argument, Mr. Bellen reminded the members that Manuela's memory had been refreshed and again highlighted the discrepancies in her testimony.

IV. Multiplicity

Appellant asserts that Specifications 4, 5, and 6 (indecent exposure) are multiplicious for finding purposes with Specifications 1, 2, and 3 (lewd and lascivious acts), respectively, of the Charge.

In the interese of judicial economy we will take appropriate consolidation action.

Specifications 1 and 4 of the Charge are consolidated by inserting after the words "his wife," and before the words, "by having" in Specification 1, the words "by willfully and wrongfully exposing his penis in an indecent manner in the presence of Manuela Zimmerman and". Specification 2 and 5 of the Charge are consolidated by inserting after the words "his wife," and before the words, "by having" in Specification 2, the words "by willfully and wrongfully exposing his penis in an indecent manner in the presence of Anja Buchmann and". Specifications 3 and

6 of the Charge are consolidated by inserting after the words "his wife," and before the words, "by having" in Specification 3, the words "by willfully and wrongfully exposing his penis in an indecent manner in the presence of Nicola Brenda, also known as Fischer, and". The finding of guility of Specifications 4, 5, and 6 of the Charge are set aside and those specifications are dismissed.[15] The findings of guilty of the Charge and of Specifications 1, 2, and 3 thereof, as amended. Specifications 1, 2, and 3 thereof, as amended, are affirmed.

Reassessing the sentence on the basis of the entire record, this Court affirms the sentence.

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[15] Because we find as fact that appellant is guilty of Specifications 4, 5, and 6, these specifications can be revived in the discretion of higher appellate authority in accordance with the conditions set forth in United States v. Williamson, 19 M.J. 617 (ACMR 1984), pet. denied, No. 51873/AR (CMA 4 Sep. 1985).

Judge CARMICHAEL and Judge ROBBLEE concur.

FOR THE COURT:

William S. Fulton,

Jr.
Clerk of Court